89-1052

DEC 28 1989

NO.

in the Supreme Court of the United States

October Term, 1989

LAKE LUCERNE CIVIC ASSN., INC.; CRESTVIEW HOMEOWNERS' ASSN., ROLLING OAKS HOMEOWNERS' ASSN., INC.; MILDRED HARRIS; BARRY YOUNG; and NORINE FLETCHER,

Petitioners,

vs.

DOLPHIN STADIUM CORP., a Florida corporation; JOSEPH ROBBIE; DADE COUNTY, a political subdivision of the State of Florida; LAWRENCE MORTON, EMIL MORTON, individually and as Trustees, LOTTIE MORTON, individually and as Trustee, ALAN MORTON, and MAX BODERMAN, d/b/a/ MORTON PROPERTIES; SOUTH FLORIDA REGIONAL PLANNING COUNCIL

Respondent.

PETITION FOR CERTIORARI REVIEW TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

H. T. SMITH, Esq.
1017 N.W. 9th Court
Miami, FL 33136
Telephone: (305) 324-1845
Counsel for Petitioners, and
GEORGE F. KNOX
LONG & KNOX, P.A.
4770 Biscayne Boulevard
Miami, Florida 33137
Telephone: (305) 576-7777

QUESTIONS PRESENTED

I.

WHETHER A RESTRICTIVE COVENANT FREELY ENTERED INTO BY A PRIVATE LANDOWNER FOR THE BENEFIT OF ADJACENT LANDOWNERS MAY BE ABROGATED BY LEGISLATION.

II.

WHETHER A FEDERAL COURT MUST GIVE RES JUDICATA EFFECT TO A DECISION OF A THREE-JUDGE STATE APPELLATE COURT AFFIRMING A ZONING ACTION, TO BAR A CLAIM BASED ON VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS, WHERE THE FEDERAL APPELLATE COURT FINDS THAT THE PARTIES HAD NO OPPORTUNITY TO LITIGATE THE CONSTITUTIONAL ISSUES BEFORE THE ZONING TRIBUNAL.

III.

WHETHER A FLORIDA APPELLATE COURT REVIEWING A ZONING PROCEEDING HAS JURISDICTION TO MAKE ITS OWN FINDINGS OF FACT ON DISPUTED LEGAL ISSUES.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

GROUNDS FOR JURISDICTION 1

OPINION OF FEDERAL COURT OF APPEALS ... 1

STATEMENT ON JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

LOCAL ORDINANCE INVOLVED 3

CITATIONS TO THE RECORD 3

STATEMENT OF THE CASE 4

Procedural Posture 4

Facts 5

ARGUMENT

I. A RESTRICTIVE COVENANT FREELY ENTERED INTO BY A PRIVATE LANDOWNER FOR THE BENEFIT OF ADJACENT LANDOWNERS MAY NOT BE ABROGATED BY LEGISLATION 10

II. A FEDERAL COURT MAY NOT GIVE RES JUDICATA EFFECT TO A DECISION OF A THREE-JUDGE STATE APPELLATE COURT AFFIRMING A ZONING ACTION, TO BAR A CLAIM BASED ON VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS, WHERE THE FEDERAL APPELLATE COURT FINDS THAT THE PARTIES HAD NO OPPORTUNITY TO LITIGATE CONSTITUTIONAL ISSUES BEFORE THE ZONING TRIBUNAL 12

TABLE OF CONTENTS (Continued)

Page

III. A FLORIDA APPELLATE COURT REVIEWING A ZONING PROCEEDING HAS NO JURISDICTION TO MAKE ITS OWN FINDINGS OF FACT ON DISPUTED LEGAL ISSUES 16

CONCLUSION 18

CERTIFICATE OF SERVICE 19

APPENDIX 20

TABLE OF AUTHORITIES

	Page
Albrecht v. State, 444 So.2d 8 (Fla. 1984)	11
Allen v. Avondale Co., 135 Fla. 6, 185 So. 137 (1938)	10, 11
Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)	15
Anderson v. Babb, 632 F.2d 300 (4th Cir. 1980)	15
Angle v. Chicago St. P., M. & O.R. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893)	11
Board of County Comm'rs of Met. Dade County v. Lowas, 348 So.2d 13 (Fla. 3d DCA 1977)	17
Board of Public Instruction v. Town of Bay Harbour Island 81 So.2d 637 (Fla. 1955)	10
Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 P.2d 124, 132 (1940)	8
de Cancino v. Eastern Airlines, Inc., 283 So.2d 97 (Fla. 1973)	13
F.T.C. v. Flotill Products, Inc., 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed.2d 398 (1967)	1
First Nat'l Bank of Ariz. v. Cities Service Co, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968)	1
Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962)	1

TABLE OF AUTHORITIES (Continued)

	Page
Genzer v. Fillip, 134 S.W.2d 730, 732 (Tex. Civ. App. (1939)	8
Huddleston v. Graham, 73 Fla. 350, 74 So. 414 (1917)	14
Kremer v. Chemical Const. Corp., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982)	12, 17
Lake Lucerne Civic Assn. v. Dolphin Stadium Corp., 878 F.2d 1360, 1368 (11th Cir. 1989).....	8
Lawton v. State, 13 So.2d 211 (Fla. 1943)	16
MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986)	11
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922)	11
Ryder Truck Lines, Inc. v. King, 155 So.2d 540 (Fla. 1963)	16
Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959)	10, 11
Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)	4
Simler v. Conner, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963)	16
Staninger v. Jacksonville Expressway Authority, 182 So.2d 483 (Fla. 1st DCA 1966)	10

TABLE OF AUTHORITIES (Continued)

	Page
State of Florida v. United States, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931)	16
Thompson v. City of Miami, 167 So.2d 841 (Fla. 1964)	11
Tolar v. Meyer, 96 So.2d 554 (Fla. 3d DCA 1957)	10
Tyson v. Aikman, 31 So.2d 272 (Fla. 1947)	16
United States v. Cala, 521 F.2d 605 (2d Cir. 1975)	14
United States v. Utah Const. & Mining Co., 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966)	13
United States Trust Co. of N.Y. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977)	11
Valley Express, Inc. v. United States, 264 F.Supp. 1006 (D.C. Wisc. 1966)	15
Wenshaw v. Smith, 151 So.2d 3 (Fla. 1963)	17
Willner v. Committee on Character and Fitness, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963)	16
Wood v. Dozier, 529 So.2d 1236 (Fla. 1st DCA 1988)	11
Wood v. Dozier, 464 So.2d 1168 (Fla. 1985)	11
Zoning Board of Monroe County v. Hood, 484 So.2d 1331 (Fla. 3d DCA 1986)	15

OTHER AUTHORITIES

	Page
U.S. Constitution, Art. I, § 10	2, 11
U.S. Constitution, Amend. VII	2, 16
U.S. Constitution, Amend. XIV	2, 16
Fla. Constitution, Art. I, § 10	10
§ 163.250, Fla. Stat. (1983)	15
Dade County Code, Sec. 33-316	3, 6, 17
28 U.S.C. § 1254	1
28 U.S.C. § 2101(c)	2
Chap. 85-855, § 19 *Laws of Florida* (1985)	15
Rules of the Sup.Ct. of the U.S., 17(c)	1
Black's Law Dictionary, (5th ed. 1979)	8, 15

GROUNDS FOR JURISDICTION

1. The federal Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court. *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 88 S.Ct. 1575, 20 L.Ed.2d 569 (1968).

2. The federal Court of Appeals has decided a federal question in a way which conflicts with decisions of the state court of last resort. Rule 17(c), Rules of the Supreme Court of the United States.

3. The federal Court of Appeals has decided a federal question in a way which conflicts with decisions of the Court of Appeals for other circuits. *F.T.C. v. Flotill Products, Inc.*, 389 U.S. 179, 88 S.Ct. 401, 19 L.Ed.2d 398 (1967).

4. The federal Court of Appeals, in deciding a res judicata or collateral estoppel issue, has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision. *Fong Foo v. United States*, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962).

OPINION OF FEDERAL COURT OF APPEALS

1. Reported at 878 F.2d 1360 (11th Cir. 1989) [Appendix].

2. Opinion filed August 3, 1989.

3. Petitions for Rehearing and Suggestions of Rehearing En Banc denied October 4, 1989 [Appendix].

STATEMENT ON JURISDICTION

Jurisdiction is based on 28 U.S.C. § 1254, which provides that

> Cases in the courts of appeal may be reviewed by the Supreme Court . . .
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

This petition for writ of certiorari is timely under 28 U.S.C. § 2101(c), which provides that "any . . . writ of certiorari intended to bring any judgment or decree in a civil action . . . before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such or decree."

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, ARTICLE I, SECTION 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver, Coin a Tender in Payment of Debts; *pass any* Bill of Attainder, ex post fact Law, or *Law impairing the Obligation of Contracts*, or grant any Title of Nobility.

CONSTITUTION OF THE UNITED STATES, AMENDMENT VII

> *In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved*, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV:

> 1. Citizenship rights not to be abridged by states. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

LOCAL ORDINANCE INVOLVED

Dade County Code, Sec. 33-316. Exhaustion of remedies; court review.

No person aggrieved by any zoning resolution order, requirement, decision or determination of an administrative official or by any decision of the zoning appeals board may apply to the court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article. It is the intention of the board of county commissioners that all steps as provided by this article shall be taken before any application is made to the court for relief; and no application shall be made to the court for relief except from resolution adopted by the board of county commissioners, pursuant to this article. *Zoning resolutions of the board of county commissioners shall be reviewed by the filing of a notice of appeal* in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedure and within the time provided by the Florida Rules of Appellate Procedure for the review of the rulings of any commission or board; and such time shall commence to run from the date the zoning resolution sought to be reviewed is transmitted to the clerk of the commission.

CITATIONS TO THE RECORD

The citation "R" refers to documents contained in the record prepared by the clerk of the court. Documents in the record are more particularly referenced by one of four volumes in the record where there may be found ("Vol."); item number in the volume ("It."); the complaint ("compl."), which is item 1, volume 1 of the record; and as exhibits attached to the complaint ("Ex."). "Tr." refers to the transcript of the zoning hearing. Opinions of the state courts reviewing the zoning action are part of the record. The opinion of the

Court of Appeals is included in the appendix to the petition and referenced by ("App."). The parties will be referred to as they appeared in the trial court. Petitioners were the plaintiffs; respondents were the defendants.

STATEMENT OF THE CASE

Procedural Posture

This petition is brought from an opinion of the federal Court of Appeals affirming in part and reversing in part a final summary judgment of the district court which dismissed two counts of a three-count complaint on grounds that the causes of action were precluded by a prior state court judgment.

All of the pertinent facts must be taken from the complaint and the plaintiffs' affidavits, in that the defendants filed no responsive pleadings or affidavits, no discovery was permitted, and no evidentiary hearings were conducted.[1]

Facts

1. *Background*

A resolution passed by the Dade County governing board granted the defendants-developers' request for zoning changes and use variances to permit construction of a stadium and helipad as a first phase of a massive land development project. Hotels and other regional-size commercial developments are part of the planned second phase which has not begun. [R., Vol. 1, Compl., Ex.C]. The subject 434-acre site had been, for a numbers of years, zoned for single family homes development consistent with the surrounding communities. [R., Vol. 1, Compl., p.5]. The residential zoning scheme was protected by a restrictive

[1]There was no determination by the district court that the petitioner's complaint or affidavits were deficient, therefore, for the purpose of deciding res judicata/collateral estoppel issues raised by the unsworn motion to dismiss, all the allegations in the complaint and affidavits must be accepted as true. Scheuer v. Rhodes, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974).

covenant of record which could be extinguished or modified only on a showing, by the respondents, that a majority of adjacent property owners consented.[2] [R., Vol. 1, Compl., Ex. A]. A majority of the adjacent property owners within 350 feet of the site opposed a release of the covenant. [R., Vol. 1, Compl., p.3; R., Vol. 4, It.42]. A 73,000 seat stadium and helipad were approved for location within 400 feet of petitioners' residential homes [R., Vol. 1, Compl., p.9]; roads to the massive complex around the plaintiffs' neighborhoods are inadequate [R., Vol. 1, Compl., p.9]; the stadium use was approved with a shortage of over 7,000 parking spaces [R. Vol. 1, Compl., p.5]; patrons to the stadium must park in the plaintiffs' neighborhoods [R., Vol. 1, Compl., p.5]; noise levels, light spillage and traffic congestion will destroy the residential character of the communities around the proposed complex. [R., Vol. 1, Compl., p.6]. The zoning changes were granted because the defendants-developers are politically influential. [R., Vol. 1, Compl., p.5].

2. *State proceedings*

The single evidentiary hearing conducted in state tribunals was an administrative zoning hearing. [Tr.] There was no notice to the plaintiffs that Dade County Commissioners would conduct a hearing to decide whether the defendants had secured sufficient consents to extinguish the covenant.

Following the zoning hearing the County Commission enacted a zoning resolution which deleted the restrictive covenant in the exercise of legislative power. [R., Vol. 1, Compl. Ex.B, p.35]. No finding was made by county commissioners that the defendants had secured the necessary majority consents, as required by the covenant, in order to effect a release of the covenant. Neither does the resolution

[2]The covenant release provision is also set out in entirety on page 1362 of the Court of Appeals opinion. [App., p.4]

contain findings of fact or conclusions of law on the allegations of the complaint which challenge the substantive constitutionality of the zoning resolution.

An appeal was taken to a three-judge panel, pursuant to section 33-316, Dade County Ordinance. That appeal is described by the Court of Appeals as the Norwood-Norland I litigation. The state appellate court affirmed the resolution with an opinion. [R., Vol. 1, It.6]. An intermediate state court of appeal, on limited review, denied certiorari with an opinion. [R. Vol. 2, It.2]. That certiorari review is referred to by the Court of Appeal as the Norwood-Norland II litigation.

3. *Federal District Court proceeding*

Count I of the well-pleaded complaint sets forth a claim for unconstitutional impairment of a restrictive covenant by a legislative enactment. [R., Vol. 1, Compl., p.4]. Count II alleged a substantively unconstitutional zoning action. [R., Vol. 1, Compl., p.4]. In paragraph 22 of the complaint the plaintiffs alleged that neither the administrative tribunal, nor state reviewing courts, had addressed the question of the constitutionality of abrogating the covenant by a legislative resolution. [R., Vol. 1, Compl., p.4]. In paragraph 40 of the complaint the plaintiffs alleged that the circuit court, reviewing the resolution by administrative appeal, declined to address the challenge to the substantive constitutional validity of the zoning resolution, holding instead that the question should be raised "in an appropriate action and forum." [R., Vol. 1, Compl., p.6]. In the prayer for relief the plaintiffs asked for a substantial damage award and a trial by jury. [R., Vol. 1, Compl., p.10].

Two of the Defendants, represented by the same attorney, filed an unsworn motion to dismiss on res judicata/collateral estoppel grounds, contending that the constitutional and covenant issues had been decided in the state courts. [R., Vol. 2]. All the other defendants joined in the motion.

The district court gave the plaintiffs notice that the defendants' unsworn motion would be treated as a motion for summary judgment. [R., Vol. 4, It.38]. Within the time permitted by the district court, the plaintiffs filed sworn affidavits in opposition to the defendants' unsworn motion to dismiss. [R. Vol. 4, It.42]. The plaintiffs averred that they were the intended beneficiaries of the restrictive covenant, and that the zoning tribunal, on-the-record, had expressly declined to decide the disputed factual and legal issues related to the restrictive covenant. [R., Vol. 4, It.42]. No counteraffidavits were filed by the defendants. Nevertheless, the district court entered a summary judgment for the defendants holding that both the restrictive covenant claim, and the claim based on an alleged invalidity of the zoning action, were barred by a prior state *trial court* judgment. [R., Vol. 4, It.59].

4. *Rulings of the federal Court of Appeals.*

a. The administrative tribunal was constitutionally infirm.

By implication the Court of Appeals correctly rejected the district court's finding that the issues presented by the complaint had ever been tried in any state court.[3] The federal Court of Appeals focused on the zoning hearing as the sole evidentiary proceeding, holding that it did not afford the plaintiffs-homeowners a fair and full opportunity to litigate.

Most significant is the Court of Appeals's description of the zoning hearing:

> More specifically, there was no quasi-judicial treatment of the release of the restrictive covenant during the hearing . . . Nor is there anything on the record, to indicate that the Board considered the

[3]By its ruling the Court of Appeals found misleading, the allegations in the defendants' unsworn motion that the issues had been adjudicated in a state trial court.

> authenticity of the consents obtained to release the restrictive covenants . . . The record belies appellees' contention that the Commissioners acted in the judicial manner required if a preclusive effect is to be given to administrative action.

Lake Lucerne Civic Assn. v. Dolphin Stadium Corp., 878 F.2d 1360, 1368 (11th Cir. 1989). [App., 14-15].

b. The state court of appeals had original jurisdiction to "adjudicate" disputed issues of fact.

After finding that the original proceeding could not be the basis for applying preclusion principles the Court of Appeals examined the state appellate court opinion and reached a different result. The Court of Appeals concluded, after reviewing the record of the same legislative proceeding where the plaintiffs had no opportunity to litigate, that the state appellate court opinion precluded a federal court trial on count I and part of count II of the complaint.

On the way to its holding that the plaintiffs had a full and fair opportunity to litigate in the state appellate court, the Court of Appeals reasoned that the three-judge state appellate court could, and did "adjudicate"[4] certain restrictive covenant factual issues not decided in the original proceeding. [App. 17]. Further, the Court of Appeals held that the plaintiffs should have "pressed" the appellate court to review the documentary evidence, filed by the defendants in the

[4] "An adjudication implies a hearing by a court, after notice, of level evidence on the factual issue(s) involved. Genzer v. Fillip, 134 S.W.2d 730, 732 (Tex. Civ. App. 1939). An adjudication is the equivalent of a "determination." Campbell v. Wyoming Dev. Co., 55 Wyo. 347, 100 P.2d 124, 132 (1940). Black's Law Dictionary, 39 (5th ed. 1979).

legislative proceeding, for the purpose of making its own findings of fact as to whether certain consent forms filed in the zoning hearing were authentic. [App. 18, n.10].[5]

Further, in affirming the district court's application of res judicata to the claim for impairment of contract rights, the Court of Appeals merged the zoning issue and the separate covenant issue, applying a legislative standard of review to count I of the complaint which is based on a contract. It held that the state appellate court's conclusion, with respect to the restrictive covenant, was unassailable because "the essential requirements of law had been met and that substantial evidence existed to support the zoning action." [p. 1369].

The record of the original proceeding is barren of a judgment, or an administrative order containing findings of fact or conclusions of law on the disputed issues. The transcript of the zoning proceedings is, likewise, totally devoid of competent evidence or factual findings on the issues presented in this federal action. [App. 18].

---

[5]None of the material facts on the restrictive covenant issue, described in the state appellate court opinions, and adopted by the federal Court of Appeals, are supported by the transcript or other records of the original proceeding. There is no record support for the statement, as fact, that the developers obtained the consents of a "majority of the owners on a parcel-by-parcel basis." [App.5]. Contrary to the statement on page 1369 of the opinion—"that the circuit and district courts accepted the County Commissioners Construction of the Covenant"—the County Commissioners never construed the covenant, either in the record, or in the subsequently enacted zoning resolution. To the contrary County Commissioners deferred appropriately to the courts for a judicial determination of the legal and factual disputes. [Transcript of zoning hearing, pp. 154-155].

ARGUMENT

I.

A RESTRICTIVE COVENANT FREELY ENTERED INTO BY A PRIVATE LANDOWNER FOR THE BENEFIT OF ADJACENT LANDOWNERS MAY NOT BE ABROGATED BY LEGISLATION.

Neither the state appellate courts or the federal courts addressed the plaintiffs' main argument that the covenant was impermissibly abrogated by the zoning resolution.

The law in Florida, as pronounced by the highest court, is that a restrictive covenant cannot be abrogated by a zoning resolution. *Allen v. Avondale Co.*, 135 Fla. 6, 185 So. 137 (1938). The ruling has been followed by Florida's intermediate appellate courts. *See, e.g., Tolar v. Meyer*, 96 So.2d 554 (Fla. 3d DCA 1957) (restrictive covenant cannot be extinguished by a zoning action); *Staninger v. Jacksonville Expressway Authority*, 182 So.2d 483 (Fla. 1st DCA 1966) (even a zoning change which is a proper exercise of the police power cannot abolish a restrictive covenant). The rationable behind the rule of law is that a restrictive covenant is a contract under Florida law, *Board of Public Instruction v. Town of Bay Harbour Island*, 81 So.2d 637 (Fla. 1955), and a zoning resolution is legislation, *Schauer v. City of Miami Beach*, 112 So.2d 838 (Fla. 1959). Impairment of a contract by legislation is unconstitutional under state law. Fla. Const., art. I, §10.

Regardless of whether the grant of the defendants' zoning request was a legitimate exercise of police power,[6] the restrictive covenant was unaffected.[7] The opinion of the federal Court of Appeals approving the total extinguishment of a restrictive covenant by a zoning resolution, conflicts with *Allen v. Avondale*, a decision of the Florida court of last resort.

The Contract Clause, United States Constitution, article I, section 10, clause 1, also limits the power of the state to impair contracts between private parties as well as their own contracts. *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977). A total destruction of the covenant, by legislation, in order to advance private commercial interests, was unreasonable by standards announced in *United States Trust Co. ov. N.Y. v. New Jersey.*

---

[6]Whenever an act of a legislative body, done in the exercise of zoning power, is challenged by appeal the inquiry is limited to the question of power, Schauer v. City of Miami Beach, 112 So.2d 838 (Fla. 1959), citing Angle v. Chicago, St. P., M. & O.R. Co., 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed. 55 (1893), or stated otherwise, whether the exercise of the police power furthers a legitimate governmental interest. Albrecht v. State, 444 So.2d 8 (Fla. 1984), citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). A challenge to a zoning action on grounds of a violation of individual constitutional rights, on the other hand, must be by an action for equitable or injunctive relief, or by a suit for damages. Thompson v. City of Miami, 167 So.2d 841 (Fla. 1964). *See also* MacDonald Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) (a zoning hearing and an action for declaratory and equitable relief are different).

[7]Disputes arising out of restrictive covenants are contractual matters for resolution by trial courts. *See* Wood v. Dozier, 529 So.2d 1236 (Fla. 1st DCA 1988), *on remand* from Wood v. Dozier, 464 So.2d 1168 (Fla. 1985).

II.

A FEDERAL COURT MAY NOT GIVE RES JUDICATA EFFECT TO A DECISION OF A THREE-JUDGE STATE APPELLATE COURT AFFIRMING A ZONING ACTION, TO BAR A CLAIM BASED ON VIOLATIONS OF FEDERAL CONSTITUTIONAL RIGHTS, WHERE THE FEDERAL APPELLATE COURT FINDS THAT THE PARTIES HAD NO OPPORTUNITY TO LITIGATE CONSTITUTIONAL ISSUES BEFORE THE ZONING TRIBUNAL.

1. *Court of Appeals Decision Conflicts with this Court's Opinions.*

The Court of Appeals' opinion conflicts with this court's opinion in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). There it was held that a federal court should give preclusive effect to a decision of a state court upholding a state administrative agency's rejection of an employment discrimination claim where, on examination of the record, it is clear that the claimant had a full and fair opportunity to litigate in a quasi-judicial administrative proceeding, and where the findings made by the administrative agency on the disputed issues would be entitled to preclusive effect under state law.

It is clear from *Kremer* that where the federal court finds that a state administrative tribunal did not afford the parties a full and fair opportunity to litigate disputed factual issues, and where the administrative tribunal made no determination on the disputed issues, the administrative ruling is constitutionally infirm and an opinion of a state appellate court upholding the administrative decision is not entitled to preclusive effect in state courts, nor preclusive effect or full faith and credit in federal courts. *Kremer* at 456 U.S. 482, 102 S.Ct. 1898.

In *United States v. Utah Const. & Mining Co.*, 384 U.S. 394 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), this court held that a decision of an administrative body will be given res judicata effect only where the "administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an opportunity to litigate . . ." *U.S. v. Utah Const. & Mining*, 384 U.S. at 422. Further this court suggested, at page 422, that there is a "need [or] justification for a second evidentiary hearing" in order to resolve factual disputes where the parties had no full and fair opportunity to present their version of the facts in the administrative proceeding, or had no opportunity to seek court review *of adverse findings.*[8]

The Eleventh Circuit relied on *United States v. Utah Const. & Mining*, in reaching a result which is inconsistent with the holding in the case. There is no suggestion in the Supreme Court opinion that appellate review is a satisfactory cure where there was no full and fair opportunity to litigate in the administrative hearing, and where the administrative agency made no findings on the disputed issues of fact.

The zoning resolution would have no preclusive effect in the state court, as to disputed factual issues or the constitutional claims, for additional reasons which are stated in the remaining arguments.

2. *Court of Appeals Decision is Contrary to Law of State Highest Court*

In resolving the preclusion issue on the basis of state appellate court opinions—to the exclusion of the record of the original proceeding—the Court of Appeals decision conflicts with the law as pronounced by the state court of last resort.

In *de Cancino v. Eastern Airlines, Inc.*, 283 So.2d 97, 99 (Fla. 1973), the Florida Supreme Court recognized that in

[8]The administrative tribunal, in this case, made no findings on any issues of fact or law.

order for res judicata principles to apply, a judgment must have been entered in the prior proceeding. Further, the state high court held that the judgment alone was not sufficient:

> [G]enerally, the effect of a judgment as res judicata must be determined from the entire record of the case, and not just from the judgment itself.

In *Huddleston v. Graham*, 73 Fla. 350, 74 So. 414 (1917), the Florida Supreme Court held that in deciding whether a cause has been previously adjudicated the court must examine the record of, and the judgment or decree entered in, the *original proceeding*. A prerequisite to any consideration of preclusion, is a judgment or administrative order, neither of which, in this case, emanated from the original state court proceeding. As the Court of Appeals noted, the record of the original proceeding would not justify the application of preclusion principles.

Since there was no judgment entered in the original proceeding, and the record reflects that the original proceeding was only legislative in nature with no findings of fact or conclusions of law on the disputed issues, under Florida law the appellate court opinion affirming the zoning resolution was entitled to no preclusive effect in this federal suit based on violations of constitutionally-protected, individual property rights.

3. *Court of Appeals Decision Conflicts with Decision of Other Circuits on Res Judicata/Collateral Estoppel.*

The holding of the Court of Appeals, that res judicata/collateral estoppel principles apply to appellate court decisions, even where the parties had no opportunity to litigate in the original proceeding, is contrary to the decision of courts of appeal in other circuits.

In *United States v. Cala*, 521 F.2d 605 (2d Cir. 1975), the second circuit held that a court called upon to decide whether issues raised in a proceeding were resolved in a prior

proceeding, must examine the record, pleadings and evidence from the earlier proceeding. The record, pleadings, and evidence are features, exclusively, of original evidentiary hearings.

In *Anderson v. Babb*, 632 F.2d 300, n.3, (4th Cir. 1980), the fourth circuit also held that res judicata, particularly its collateral estoppel branch, is not an inexorable rule, and that a court asked to give collateral estoppel effect to the prior determination of an issue by another judicial tribunal is entitled to scrutinize the nature of the original tribunal and the course of the proceedings to ensure that the traditional guarantees justifying the application of the principle are present. The inquiry, on scrutiny of the prior tribunal which issued the judgment relied upon for preclusion, is whether the original tribunal afforded the federal plaintiff a full and fair opportunity to litigate[9] the federal constitutional claim. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 262 (1980).

The state appellate court was not an original proceeding where federal constitutional claims, not litigated in the zoning hearing, could have been adjudicated.[10]

4. *Due Process and Right to Jury Trial Denied.*

The effect of applying a legislative standard of review to the contract dispute is four-fold: (1) it shifted to the plaintiffs-homeowners, after the zoning hearing, and contrary to the

---

[9]Litigate means to bring on for a trial by a complaint or petition, and to have the issues decided on the evidence presented or stipulated to. Valley Express, Inc. v. United States, 264 F.Supp. 1006, 1009 (D.C. Wisc. 1966); Black's Law Dictionary, 841 (5th ed. 1979).

[10]Florida appellate courts reviewing a zoning resolution have no jurisdiction to conduct *de novo* evidentiary hearings. The right to a trial *de novo*, previously authorized by section 163.250, Florida Statutes (1983), was abolished July 1, 1985, prior to the September 1985 zoning hearing. Chap. 85-55, § 19, *Laws of Florida* (1985); Zoning Board of Monroe County v. Hood, 484 So.2d 1331, n.1 (Fla. 3d DCA 1986).

terms of the contract, the burden of going forward with the evidence, (2) it relieved the developers-defendants of their burden to prove a release of the covenant by a preponderance of the evidence as required in civil cases under Florida law, *Lawton v. State*, 13 So.2d 211 (Fla. 1943), and armed them instead with a presumption of correctness, without proof, which attaches only to legislative enactments, (3) it deprived the plaintiffs of a constitutional right to a trial by jury in violation of the Seventh Amendment to the United States Constitution, *Simler v. Conner*, 372 U.S. 221, 83 S.Ct. 609, 9 L.Ed.2d 691 (1963) (on certiorari review), and (4) it denied the plaintiffs prior notice and a full and fair opportunity to be heard on the contract claim, in violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution. *Willner v. Committee on Character and Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963) (on certiorari review).

III.
A FLORIDA APPELLATE COURT REVIEWING A ZONING PROCEEDING HAS NO JURISDICTION TO MAKE ITS OWN FINDINGS OF FACT ON DISPUTED LEGAL ISSUES.

Fundamental principles of appellate review, as announced by the Florida Supreme Court, are (1) an appeal is not an evidentiary hearing, *Tyson v. Aikman*, 31 So.2d 272 (Fla. 1947), (2) an appellate court reviewing an action of an administrative body is restricted to deciding whether factual findings and legal conclusions, *as made by the administrative tribunal*, are supported by the record and the law. *Ryder Truck Lines, Inc. v. King*, 155 So.2d 540 (Fla. 1963), citing *State of Florida v. United States*, 282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931). (e.s.) It is a "basic concept" that courts reviewing the actions of administrative bodies are not fact-finding tribunals and are limited to vacating administrative orders, insofar as they adjudicate disputed issues, where there

are no findings of fact on those issues. *Wenshaw v. Smith*, 151 So.2d 3 (Fla. 1963).

The federal Court of Appeals' decision, however, has explicitly approved, and given res judicata effect to an appellate court's adjudications and determinations on disputed issues of fact and law, after holding that the original proceeding was not quasi-judicial, that it afforded the parties no full and fair opportunity to litigate, and that it produced no findings of facts on those same disputed issues.

The implicit holding of the Court of Appeals that a state appellate court, reviewing a zoning resolution by administrative appeal, has jurisdiction to delve into the record for the purpose of making its own findings of fact on disputed issues, is so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

Further, in that the original proceeding was constitutionally infirm for judicial purposes because there was no prior notice, no opportunity to fully and fairly present evidence, and no opportunity to cross-examine witnesses, then the record made of the proceeding could not have bene relied upon by an appellate court for a *de novo* trial on the record.[11] Nevertheless the Court of Appeals, in contradictory fashion, held that the state court of appeals, on the basis of the record made in the constitutionally infirm administrative proceeding, had jurisdiction to adjudicate material factual disputes. The holding is without precedent.

While giving comity to a state appellate court decision, the federal Court of Appeals ignored higher Fourteenth Amendment due process requirements, *Kremer v. Chemical Constr. Corp.*, and has dangerously expanded res judicata/collateral estoppel principles.

[11]In a case involving an administrative appeal pursuant to section 33-316, Dade County Code, an intermediate appellate court held that on review of a zoning resolution the circuit court is limited to "the record as made before that [zoning] agency." Board of County Comm'rs of Met. Dade County v. Lowas, 348 So.2d 13, 17 (Fla. 3d DCA 1977).

CONCLUSION

For the reasons that the Eleventh Circuit opinion constitutes a radical departure from the essential requirements of the substantive and procedural law, the petitioners pray the court issue a writ of certiorari.

RESPECTFULLY SUBMITTED,

H. T. SMITH, Esq.
1017 N.W. 9th Court
Miami, FL 33136
Telephone: (305) 324-1845
and
GEORGE F. KNOX
LONG & KNOX, P.A.
4770 Biscayne Boulevard
Miami, Florida 33137
Telephone: (305) 576-7777

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was served by U.S. Mail this 27th day of December, 1989, upon those persons shown below:

Robert L. Krawcheck, Esq.
Assistant County Attorney
Attorney for Appellee Dade County
111 N.W. First Street
Suite 2810
Miami, Florida 33128

Donald S. Rosenberg, Esq.
Rosenberg, Reisman & Glass
Attorneys for Appellees The Mortons
2600 Amerifirst Building
One S.E. Third Avenue
Miami, Florida 33313

Samuel S. Goren, Esq.
Josias & Goren, P.A.
Attorneys for Appellee South Florida Regional Planning Counsel
3099 East Commercial Boulevard
Suite 200
Fort Lauderdale, Florida 33308

Robert L. Shevin, Esq.
Stroock & Stroock & Lavan
Attorneys for Appellees Dolphin Stadium Corp., and Joseph Robbie
3300 Southeast Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2385

BY: H. T. Smith

H. T. Smith, P.A.
Attorney-at-Law
1017 N.W. 9th Court
Miami, Florida 33136
Telephone: (305) 324-1845